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No. 09-625

In The
Supreme Court of the United States

LFP PUBLISHING GROUP, LLC,
d/b/a Hustler Magazine,
Petitioner,

v.

MAUREEN TOFFOLONI, as Administrator and Personal Representative of the Estate of Nancy E. Benoit,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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REPLY BRIEF FOR PETITIONER

Respondent asserts in her opposing Brief ("Resp. Brief') that the instant Petition for a writ of certiorari by LFP Publishing Group, LLC ("LFP"), as well as the supporting Briefs submitted by a*micus curiae,* fail to comport with this Court's Rule 10 governing its considerations for granting a such a writ. (Resp. Brief, pp.5-6). As relevant, Rule 10 provides that a writ of certiorari may be granted where a court of appeals has rendered a decision in conflict with a decision of another court of appeals on the same important matter; or it has decided an important federal question in conflict with the relevant decisions of this Court. Here, both of those criteria have been met, as seen from the Petition and *amicus* Briefs. That is, a number of circuit court decisions are contrary to the restrictive ruling of the Eleventh Circuit below, that the subject nude photographs of decedent public figure Nancy Benoit ("Benoit") were not deemed to be sufficiently "newsworthy" to be outside of the ambit of the Georgia common law right of publicity tort sued upon by Plaintiff Maureen Toffoloni ("Toffoloni").

In addition, the narrow ruling by the Eleventh Circuit is contrary to several opinions of this Court, stating that publishers are to be afforded wide latitude in determining for themselves what is "newsworthy" under the press freedoms expressly granted by the First Amendment. Accordingly, Petitioner respectfully requests that a writ of certiorari be granted to correct the important, erroneous ruling of the Eleventh Circuit below. The rationale of that ruling would perversely allow

courts to weigh equally the individual economic publicity rights provided in a state common law tort, against the express right of freedom of the press granted by the First Amendment. Moreover, as stated in the *amicus* Brief of The Reporters Committee for Freedom of the Press and The Society for Professional Journalists, said opinion, "goes well beyond the photographs that appear in magazines such as Petitioner's to affect all newsgathering" (p.4).

I. THE DECISION BY THE ELEVENTH CIRCUIT BELOW IS IN CONFLICT WITH THE DECISIONS OF OTHER UNITED STATES COURTS OF APPEALS ON THE SAME IMPORTANT MATTER.

Respondent asserts that the Eleventh Circuit opinion is "directly in line" with other circuits, specifically naming the Second, Fifth, Seventh and Tenth Circuits, which she claims have held that to balance the First Amendment right of freedom of the press against the right of privacy, "every private fact disclosed in an otherwise truthful newsworthy publication must have some substantial relevance to a matter of legitimate public interest," citing Toffoloni v. LFP Publishing Group, LLC, 572 F.3d 1201, 1212 (11th Cir. 2009) [Resp. Brief, pp.8-9]. That assertion is erroneous.

As an initial matter, and as will be further discussed in Point II *infra*, this case is not about the right of privacy, a strictly personal right of a living plaintiff, but about the different right of publicity, an

economic property right. Here, Respondent Toffoloni's Complaint asserts a single tort cause of action against Petitioner LFP, invoking decedent Benoit's Georgia posthumous common law right of publicity, not a right of privacy. Nevertheless, Petitioner will review the arguments raised by Respondent as to privacy rights.

For her purported reliance on Tenth Circuit decisions, Respondent cites Gilbert v. Med. Econ. Co., 665 F.2d 305, 308 (10th Cir. 1981) [Resp. Brief, p.9]. However, that circuit court in Anderson v. Suiters, 499 F.3d 1228, 1236 (10th Cir. 2007), quoting from an earlier decision,[1] recently acknowledged that other courts give public interest status to news material "on an aggregate basis, rather than itemizing what in the news report would qualify and what could remain private" (citation omitted). Thus, the Tenth Circuit does not require a parsing of every single potentially private fact in a news article to have specific relevance to a newsworthy item. In Anderson, an alleged rape victim sued a television station and others for airing a fictional depiction of her rape, a highly personal and embarrassing matter. Nevertheless, the Tenth Circuit found the report to be overall of legitimate public interest and affirmed summary judgment dismissing the claim.

Similarly, Respondent's mischaracterization of the Fifth Circuit's position is demonstrated by Lowe v. Hearst Communications, Inc., 487 F.3d 246 (5th

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[1] Alavarado v. KOB-TV, LLC, 493 F.3d 1210, 1221 (10th Cir. 2007).

Cir. 2007). In its expansive reading of First Amendment protection for publishers, that court emphasized it would not become involved "in deciding the newsworthiness of specific details in a newsworthy story where the details were 'substantially related' to the story." 487 F.3d at 251. Thus, the Fifth Circuit also declined to become involved in scrutinizing the individual details of a newsworthy story where the overall piece is newsworthy. Here, it is beyond dispute that the murder of decedent Benoit was national news, and that *Hustler* Magazine's biographical story on her life and death was of public interest.

The decision in Titan Sports, Inc. v. Comics World Corp., 870 F.2d 85 (2d Cir. 1989) [Resp. Brief, p.9], dealt with the unauthorized publication of large photographs of various professional wrestlers[2] folded and stapled into the center of a wrestling magazine like posters, which were used to advertise and sell the magazine. No newsworthy event was associated with the magazine. The Second Circuit found an issue of fact as to whether the photographs/posters were a commercial use, or of public interest protected by the First Amendment. (870 F.2d at 89).

The foregoing circuit court rulings merely requiring for insulation from privacy liability that each fact be substantially related to a newsworthy matter of public interest as a whole, strikingly conflict with the Eleventh Circuit's much more

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[2] Titan Sports owned the rights in the wrestlers' names and likenesses. 870 F.2d at 87.

stringent requirement that each private fact must itself be newsworthy.

Next, Respondent expressly agrees with Petitioner as to the liberal construction to be given to "newsworthiness." Thus, Respondent proclaims: "No doubt, consideration of newsworthiness should be broadly construed, and yes, courts should be cautious in their consideration of what is newsworthy" (Resp. Brief, p.10). She even cites Harper & Rowe Publishers, Inc. v. Nation Enterprises, 471 U.S. 539, 561 (1985), stating that "Courts should be chary of deciding what is and what is not news." (Resp. Brief, p.10).

Respondent, however, raises a "straw man" argument, asserting it is Petitioner's proposition that "publishers are the final arbiters of newsworthiness." (Resp. Brief, p.10). This is a serious exaggeration of LFP's position. Petitioner does not claim that it and other publishers have an unfettered right to publish whatever they choose, without any judicial oversight. What Petitioner does assert is that in the case of an article of clear public interest, such as the present one on the life and death of Nancy Benoit, a celebrity even before her sensational murder, a publisher should be afforded substantial discretion to determine what is newsworthy to its readers. Here, decedent Benoit had been a flamboyant celebrity in the wrestling world under the name "Fallen Angel"; even Respondent concedes she was a public figure prior to her murder. The fact that Benoit once posed nude intending to further a modeling career is of interest to many readers of *Hustler* magazine and others.

Respondent's contention that this Court's seminal opinion in Time, Inc. v. Hill, 385 U.S. 374 (1967), did not hold that newsworthiness is to be determined by publishers and not by the courts (Resp. Brief, p.12), is another false argument. In a civil society where legal issues are ultimately determined by courts, obviously publishers do not have *carte blanche* to publish anything they desire; nor does Petitioner so assert. However, the First Amendment demands that publishers be given wide latitude in their determination of what is newsworthy, and courts should be reluctant to overrule such decisions, as this Court has recognized, Harper & Rowe, supra, 471 U.S. at 561.

Curiously, in its opinion below, the Eleventh Circuit failed to cite a single decision of this Court analyzing the rights of publishers under the First Amendment. The only opinion of this Court therein mentioned is Zacchini v. Scripps-Howard Broadcasting, Co., 433 U.S. 562 (1977), which Respondent agrees does not discuss that issue. (Resp. Brief, p.14). Rather, it narrowly ruled that where a television station broadcast plaintiff's entire "human cannonball" entertainment act without authorization, the First and Fourteenth Amendments did not immunize defendants from liability on the right of publicity claim under Ohio tort law.

Respondent's attempts to distinguish cases cited by Petitioner and *amicus curiae* are entirely unpersuasive, as the judicial philosophy granting broad discretion to publishers of material of public interest is quite clear from other circuits. For

instance, Respondent cites Lowe v. Hearst Communications, Inc., 487 F.3d 246 (5th Cir. 2007) [Resp. Brief, p.16], as merely standing for the proposition that because the case involved the state's legal system by lawyers in an arguably blackmail context, it was of public interest and therefore it was lawful to publish private facts about plaintiff. There, a claim for invasion of privacy against a newspaper that revealed details of an alleged extortion scheme was dismissed. The Fifth Circuit stated that it rejected "excessive judicial intervention" which might result in the withholding of critical information of legitimate public interest; the court declined to become involved in deciding the newsworthiness of specific details of a newsworthy story where they were overall substantially related to the newsworthy matter. 487 F.3d at 251.

In Ross v. Midwest Communications, Inc., 870 F.2d 271 (5th Cir. 1989) [Resp. Brief, pp.17-18], a woman identified as a rape victim in a documentary sued for invasion of privacy. The Fifth Circuit affirmed dismissal of her claim, finding that the intimate details of the living plaintiff were newsworthy, and publication was protected by the First Amendment. Unquestionably, the details of her rape were extremely embarrassing to the Ross plaintiff. The court warned that "judges, acting with the benefit of hindsight, must resist the temptation to edit journalists aggressively." 870 F.2d at 275.

Respondent even cites Anderson v. Suiters, supra (Resp. Brief, pp.18-19), for the proposition that in balancing freedom of the press against the right of privacy, "every private fact disclosed in an otherwise

truthful, newsworthy publication *must have some substantial relevance to a matter of legitimate public interest*," 499 F.3d at 1236; emphasis in original. But as explained above, that quotation was taken from an older Tenth Circuit case, Gilbert v. Med. Econ. Co., 665 F.2d 305, 308 (10th Cir. 1981). In Anderson, a more recent invasion of privacy case involving depiction of an alleged rape, the court agreed that the sensitive nature of the material in question might make its disclosure highly offensive, but that did not make the videotape less newsworthy, "so long as the material as a whole is substantially relevant to a legitimate matter of public concern," 499 F.3d at 1236, citing Ross, supra. Thus, under current Tenth Circuit law, the issue is whether the material in question is related to a matter newsworthy as a whole, not reviewing individual parts of the publication to see if each portion is itself newsworthy.

Here, it is undisputed that the *Hustler* article on Ms. Benoit's life and death was a matter of public interest. The fact that the former "Fallen Angel" also posed nude as a young woman is clearly related to her life story, and the photos illustrating that part of her life are substantially related to the newsworthy article as a whole.

II. THE ELEVENTH CIRCUIT ERRONEOUSLY BALANCED THE GEORGIA COMMON LAW RIGHT OF PUBLICITY TORT AGAINST THE EXPRESS FIRST AMENDMENT RIGHT OF FREEDOM OF THE PRESS.

A crucial part of the erroneous analysis by the Eleventh Circuit was its attempt to balance the mere state common law economic tort of the right of publicity (in the guise of a purported right of privacy) against the express First Amendment right of freedom of the press. Respondent has made the same mistake as well.

In its opinion, the Eleventh Circuit stated that the rights of freedom of speech and of the press guaranteed by the First Amendment, and the right to privacy guaranteed by the due process clause, are fundamental Constitutional rights that have no hierarchy between them. Accordingly, it asserted that the Constitution required a balancing of the supposedly co-equal fundamental rights, "which resonates with our community morals." (572 F.3d at 1207-08; Resp. Brief, p.3). However, that is a false balance in this instance.

The right of privacy, as recognized by the due process clauses, is a personal right of a living person. As described by Professor McCarthy in his treatise, privacy rights "protect human dignitary values, damage to which is measured by mental and physical suffering and damage to reputation. Such classic 'privacy' rights die with the person whose

privacy was allegedly invaded."[3] On the other hand, the right of publicity is an economic right that concerns the monetary value in the name, picture or likeness of a celebrity or public figure. Martin Luther King, Jr. Center v. American Heritage Products, 250 Ga. 135, 142 (1982). In Georgia, that property right is freely assignable during the person's lifetime, 250 Ga. at 143, and is posthumous, "inheritable and devisable," 250 Ga. at 145.

This Court recognized the economic value in an Ohio right of publicity claim in Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562 (1977). Zacchini also acknowledged the difference between the privacy and publicity torts, stating that a false light privacy claim sought to protect the plaintiff's reputation and against mental distress; a publicity claim protects plaintiff's "proprietary interest" (433 U.S. at 573).

The Eleventh Circuit erroneously attempted to conflate the rights of privacy and publicity. It is the personal right of privacy that is protected by due process; the right of publicity is a mere state tort law property right. Moreover, "'Property interests, of course, are not created by the Constitution,' but rather 'by existing rules or understandings that stem from an independent source such as state law.'" Board of Regents of State College v. Roth, 408 U.S. 564, 577 (1972). Thus, where Nancy Benoit's death precipitated this matter, any right of privacy claim died with her, and no basis exists for a balancing of the right of freedom of the press against any kind of

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[3] 2 J. Thomas McCarthy, The Rights of Publicity and Privacy, § 9.1. pp. 394-95 (2d ed. 2009).

due process privacy claim by Respondent Toffoloni. In any event, the Georgia common law state property tort of the right of publicity cannot be used to trump the express freedoms afforded to Petitioner publisher by the First Amendment.

Here, both the circuit court below and Respondent mistakenly sought to balance what they believed to be opposite constitutional rights; namely, "the competing interests between freedom of the press and the right of privacy" (Resp. Brief, p.26). However, the actual competing interests herein are the express constitutional right of freedom of the press versus the lesser state common law right of publicity – a mere economic tort.

The error of the Eleventh Circuit's analysis is further illustrated by its reliance on Douglass v. Hustler Magazine, Inc., 769 F.2d 1128 (7th Cir. 1985), discussed at 572 F.3d 1212-13 (Resp. Brief, p.29). Douglass involved a successful action against a predecessor of Petitioner for its unauthorized publication of nude photos of plaintiff that she had posed for in *Playboy* magazine. There, plaintiff was a living model who professionally posed for nude photographs, and there was no newsworthy event substantially related to the publishing of the unauthorized photographs. Thus, Douglass is completely distinguishable from the instant case, where publication of decedent Benoit's photographs was clearly related to a newsworthy event. Moreover, in Douglass, the Seventh Circuit indicated that forbidding *Hustler* magazine to publish any photographs of people without their consent because

the magazine may be offensive to some would likely violate the First Amendment. 769 F.2d at 1139.

CONCLUSION

Here, the posed, non-obscene nude photographs of decedent Benoit, a public figure prior to her death, were part of a newsworthy biographical article on her life and death. To the extent that state common law might allow liability under these circumstances for violation of her right of publicity, such a result should be proscribed by the freedom of the press afforded to Petitioner by the First Amendment to the United States Constitution.

For the reasons set forth above, and in the original Petition and the supporting *amicus* Briefs, the Petition for a writ of certiorari should be granted.

Dated: February 4, 2010

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